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SEP 28 1966
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. 363

IN THE MATTER OF THE APPLICATION OF
ARTHUR L. REESE

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

REPLY TO THE COMMISSIONER OF PATENTS' MEMORANDUM IN OPPOSITION

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The position of the Commissioner of Patents in his opposition memorandum is directly in conflict with the decision of the Court of Customs and Patent Appeals and emphasizes the confusion in the Patent Office Rules regarding the time for filing appeals from the Patent Office Board of Appeals to the Court of Customs and Patent Appeals 1

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REPLY TO THE COMMISSIONER OF PATENTS' MEMORANDUM IN OPPOSITION

THE POSITION OF THE COMMISSIONER OF PATENTS IN HIS OPPOSITION MEMORANDUM IS DIRECTLY IN CONFLICT WITH THE DECISION OF THE COURT OF CUSTOMS AND PATENT APPEALS AND EMPHASIZES THE CONFUSION IN THE PATENT OFFICE RULES REGARDING THE TIME FOR FILING APPEALS FROM THE PATENT OFFICE BOARD OF APPEALS TO THE COURT OF CUSTOMS AND PATENT APPEALS.

In defending the timeliness of his appeal, appellant has maintained that he filed his appeal in compliance with Rule 304 as modified by the exception of Rule

197(b). The Court of Customs and Patent Appeals held in its decision that appellant has not complied with Rule 304 and that Rule 197(b) is not "germane" to the issue of timeliness. The Court stated:

> The petitioner argues, as he did in the opposition to the Patent Office motion, that he is entitled to the "benefit" of Patent Office Rule 197(b). The lengthy petition is mostly devoted to arguing why appellant is entitled to that "benefit."
>
> Assuming, arguendo, that appellant is entitled to whatever benefit is to be had from Rule 197(b), though he admits that he has not technically come within its provision, we think that rule is not germane to the issue here. It relates only to the time for a request or petition to the Board of Appeals for a rehearing or reconsideration or modification of its decision by it, not by us.
>
> The time for appealing to this court is governed by Patent Office Rule 304, promulgated in accordance with 35 USC 142, and appellant makes no contention that he has complied with that rule. Rather, he argues that Rule 197(b) provides for an exception to Rule 304. That is not the fact.

On the other hand, the Commissioner of Patents in his Memorandum in Opposition (pages 3 and 4) takes the position that the conditions set forth by Rule 197(b) *do* provide an exception to Rule 304 and that Rule 197(b) *does* extend the time for filing an appeal, but that appellant does not qualify under the Rule. This creates a direct conflict between the holding of the Court of Customs and Patent Appeals, which says Rule 197(b) does not apply, and the Commissioner,

who promulgated those same rules under 35 USC 142, whose position is that the Rule 197(b) does apply but that appellant does not qualify thereunder.

Appellant vainly argued to the Court of Customs and Patent Appeals that Rule 197(b) should be interpreted as providing an exception to Rule 304, as the Commissioner admits, and that the question was whether the appellant is entitled to the benefit of that Rule. But the Court held that Rule 197(b) is not "germane" to the issue of timeliness. Therefore, appellant's appeal has been dismissed on an interpretation by the Court that Rule 197(b) is not applicable, while the authority which promulgated the rule says it is.

The obvious conflict between the Commissioner of Patents and the Court of Customs and Patent Appeals in the application and interpretation of the rules governing appeals to that Court requires an exercise of the supervisory power of the United States Supreme Court to protect the right of appeal of applicants before the Patent Office.

Dated, Berkeley, California,
September 26, 1966.

Respectfully submitted,
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Counsel for Petitioner.

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